

SENATE BILL 591

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P2

2003 Regular Session
3r1729
CF 3r1344

By: **Senators Conway, Stone, and Jones**
Introduced and read first time: February 5, 2003
Assigned to: Rules
Re-referred to: Education, Health, and Environmental Affairs, February 7, 2003

Committee Report: Favorable with amendments
Senate action: Adopted
Read second time: March 18, 2003

CHAPTER _____

1 AN ACT concerning

2 **Procurement - Security for Construction Contracts - Retainage**

3 FOR the purpose of limiting the retainage that may be specified in a construction
4 contract awarded by a public body under certain circumstances; authorizing a
5 public body to withhold payments in addition to retainage under certain
6 circumstances; requiring a public body to release certain retainage and interest
7 to a contractor within a certain number of days of either the completion of the
8 contract or the resolution of a certain dispute or contract claim; limiting the
9 amount that a contractor may withhold from a subcontractor or that a
10 subcontractor may withhold from a lower tier subcontractor under a
11 construction contract awarded by a public body under certain circumstances;
12 providing for certain exceptions to the limitations on withholding; providing for
13 the availability of escrow for retainage in construction contracts awarded by a
14 public body; requiring that interest on money placed in escrow be handled in a
15 certain manner; restricting the availability of escrow in certain circumstances;
16 requiring the escrow agent to follow the directions of the contractor in relation to
17 the investment of retainage being held by the escrow agent; providing for the
18 application and construction of this Act; and generally relating to construction
19 contracts awarded by a public body.

20 BY renumbering
21 Article - State Finance and Procurement
22 Section 17-110
23 to be Section 17-112
24 Annotated Code of Maryland
25 (2001 Replacement Volume and 2002 Supplement)

1 BY adding to
2 Article - State Finance and Procurement
3 Section 17-110 and 17-111
4 Annotated Code of Maryland
5 (2001 Replacement Volume and 2002 Supplement)

6 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
7 MARYLAND, That Section(s) 17-110 of Article - State Finance and Procurement of
8 the Annotated Code of Maryland be renumbered to be Section(s) 17-112.

9 SECTION 2. AND BE IT FURTHER ENACTED, That the Laws of Maryland
10 read as follows:

11 **Article - State Finance and Procurement**

12 17-110.

13 (A) (1) IF A CONTRACTOR HAS FURNISHED 100% PAYMENT SECURITY AND
14 100% PERFORMANCE SECURITY IN ACCORDANCE WITH THIS SUBTITLE UNDER A
15 CONTRACT FOR CONSTRUCTION AWARDED BY A PUBLIC BODY, THE PERCENTAGE
16 SPECIFIED IN THE CONTRACT FOR RETAINAGE MAY NOT EXCEED 5% OF THE TOTAL
17 AMOUNT.

18 (2) IN ADDITION TO RETAINAGE, A PUBLIC BODY MAY WITHHOLD FROM
19 PAYMENTS OTHERWISE DUE A CONTRACTOR ANY AMOUNT THAT THE PUBLIC BODY
20 REASONABLY BELIEVES NECESSARY TO PROTECT THE PUBLIC BODY'S INTEREST.

21 (3) RETAINAGE WITHHELD BY A PUBLIC BODY MAY BE DEPOSITED IN AN
22 INTEREST-BEARING ESCROW ACCOUNT IN ACCORDANCE WITH § 17-111 OF THIS
23 SUBTITLE.

24 (4) EXCEPT AS PROVIDED IN PARAGRAPH (5) OF THIS SUBSECTION,
25 WITHIN 120 DAYS AFTER SATISFACTORY COMPLETION OF A CONTRACT FOR
26 CONSTRUCTION, A PUBLIC BODY SHALL:

27 (I) RELEASE ANY RETAINAGE DUE TO THE CONTRACTOR; AND

28 (II) PAY ANY INTEREST THAT:

29 1. HAS ACCRUED ON THE RETAINAGE; AND

30 2. IS DUE AND PAYABLE TO THE CONTRACTOR.

31 (5) IF THERE IS A DISPUTE OR CONTRACT CLAIM BETWEEN THE
32 CONTRACTOR AND THE PUBLIC BODY CONCERNING THE SATISFACTORY
33 COMPLETION OF A CONTRACT FOR CONSTRUCTION, THE PUBLIC BODY SHALL
34 RELEASE THE RETAINAGE AND ANY INTEREST DUE TO THE CONTRACTOR WITHIN 120
35 DAYS OF THE RESOLUTION OF THE DISPUTE OR CONTRACT CLAIM.

1 (B) (1) A CONTRACTOR MAY NOT RETAIN A PERCENTAGE OF PAYMENTS DUE
2 A SUBCONTRACTOR THAT EXCEEDS THE PERCENTAGE OF PAYMENTS RETAINED BY
3 THE PUBLIC BODY.

4 (2) PARAGRAPH (1) OF THIS SUBSECTION MAY NOT BE CONSTRUED TO
5 PROHIBIT A CONTRACTOR FROM WITHHOLDING ANY AMOUNT IN ADDITION TO
6 RETAINAGE IF THE CONTRACTOR DETERMINES THAT A SUBCONTRACTOR'S
7 PERFORMANCE UNDER THE SUBCONTRACT PROVIDES REASONABLE GROUNDS FOR
8 WITHHOLDING THE ADDITIONAL AMOUNT.

9 (C) (1) A SUBCONTRACTOR MAY NOT RETAIN A PERCENTAGE OF PAYMENTS
10 DUE A LOWER TIER SUBCONTRACTOR THAT EXCEEDS THE PERCENTAGE OF
11 PAYMENTS RETAINED FROM THE SUBCONTRACTOR.

12 (2) PARAGRAPH (1) OF THIS SUBSECTION MAY NOT BE CONSTRUED TO
13 PROHIBIT A SUBCONTRACTOR FROM WITHHOLDING ANY AMOUNT IN ADDITION TO
14 RETAINAGE IF THE SUBCONTRACTOR DETERMINES THAT A LOWER TIER
15 SUBCONTRACTOR'S PERFORMANCE UNDER THE SUBCONTRACT PROVIDES
16 REASONABLE GROUNDS FOR WITHHOLDING THE ADDITIONAL AMOUNT.

17 (D) IF RETAINAGE HAS BEEN PLACED IN ESCROW UNDER § 17-111 OF THIS
18 SUBTITLE, EACH PAYMENT OF RETAINAGE SHALL INCLUDE A PRO RATA PORTION OF
19 INTEREST EARNED.

20 (E) THIS SECTION MAY NOT BE CONSTRUED TO LIMIT THE APPLICATION OF
21 THE REMAINING PROVISIONS OF THIS SUBTITLE.

22 17-111.

23 (A) THIS SECTION DOES NOT APPLY TO ANY PROCUREMENT CONTRACT
24 FUNDED WITH TAX EXEMPT FINANCING.

25 (B) (1) SUBJECT TO THE REQUIREMENTS OF THIS SECTION, A CONTRACTOR
26 UNDER A PROCUREMENT CONTRACT THAT A PUBLIC BODY AWARDS FOR
27 CONSTRUCTION IS ENTITLED TO HAVE RETAINAGE UNDER THE PROCUREMENT
28 CONTRACT PLACED IN AN ESCROW ACCOUNT IF THE CONTRACTOR:

29 (I) ELECTS THAT PROCEDURE IN THE PROCUREMENT CONTRACT
30 IN THE SPACE PROVIDED FOR THAT ELECTION; AND

31 (II) SUBMITS TO THE PUBLIC BODY AN ESCROW AGREEMENT THAT
32 MEETS THE REQUIREMENTS OF SUBSECTION (C) OF THIS SECTION.

33 (2) THE PROCUREMENT CONTRACT SHALL IDENTIFY THE ESCROW
34 AGENT.

35 (C) THE ESCROW AGREEMENT SHALL:

36 (1) BE ON A FORM THAT THE PUBLIC BODY PROVIDES;

1 (2) INCLUDE THE COMPLETE ADDRESS OF BOTH THE ESCROW AGENT
2 AND THE SURETY;

3 (3) AUTHORIZE THE PUBLIC BODY TO PAY RETAINAGE TO THE ESCROW
4 AGENT; AND

5 (4) BE SIGNED BY:

6 (I) THE CONTRACTOR;

7 (II) THE SURETY FOR THE CONTRACTOR; AND

8 (III) THE ESCROW AGENT.

9 (D) ON COMPLIANCE WITH THE REQUIREMENTS OF SUBSECTION (B) OF THIS
10 SECTION, THE PUBLIC BODY SHALL PAY THE RETAINAGE TO THE ESCROW AGENT
11 UNLESS:

12 (1) FEDERAL MONEY IS INVOLVED AND APPLICATION OF THIS SECTION
13 WOULD JEOPARDIZE TIMELY RECOVERY OF THAT FEDERAL MONEY; OR

14 (2) RETAINAGE IS WITHHELD FOR:

15 (I) LACK OF PROGRESS ON THE PART OF THE CONTRACTOR; OR

16 (II) OTHER VIOLATIONS BY THE CONTRACTOR.

17 (E) IN ACCORDANCE WITH THE ESCROW AGREEMENT, A CONTRACTOR MAY
18 REQUIRE AN ESCROW AGENT:

19 (1) TO INVEST THE RETAINAGE PLACED IN THE ESCROW ACCOUNT; AND

20 (2) TO THE EXTENT THE CONTRACTOR IS ENTITLED TO RETAINAGE
21 UNDER SUBSECTION (F)(2)(II) OF THIS SECTION, TO PAY THE EARNINGS ON THE
22 INVESTMENT TO THE CONTRACTOR.

23 (F) (1) RETAINAGE MAY BE RELEASED TO THE CONTRACTOR ONLY AS
24 DIRECTED BY THE PUBLIC BODY.

25 (2) AT THE TIME OF FINAL PAYMENT, THE PUBLIC BODY SHALL DIRECT
26 THE ESCROW AGENT TO SETTLE THE ESCROW ACCOUNT BY DISTRIBUTING MONEY
27 IN THE ESCROW ACCOUNT IN THE FOLLOWING ORDER:

28 (I) TO THE PUBLIC BODY FOR ANY CLAIM IT MAY HAVE AGAINST
29 THE CONTRACTOR UNDER THE PROCUREMENT CONTRACT; AND

30 (II) TO THE CONTRACTOR.

31 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall be
32 construed to apply only prospectively and may not be applied or interpreted to have

1 any effect on or application to any contracts entered into before the effective date of
2 this Act.

3 SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect
4 October 1, 2003.